

SERVICE DATE – LATE RELEASE JUNE 22, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35522

CSX TRANSPORTATION, INC.—ACQUISITION OF OPERATING EASEMENT—GRAND
TRUNK WESTERN RAILROAD COMPANY

Digest:¹ In 2013, the Board authorized CSX Transportation, Inc. (CSXT), to acquire an operating easement over a rail line of the Grand Trunk Western Railroad Company in the Chicago area, subject to conditions. The City of Chicago and the Village of Evergreen Park have asked the Board to reopen the proceeding to address their concerns regarding excessive street blockages at at-grade crossings on the line. This decision reopens the proceeding and orders CSXT to comply with the representation it made in its application that it would not route a train onto the Elsdon Line unless the Line was clear or show cause why it is unable to do so. This decision also requires CSXT to file monthly reports for one year providing detailed information about at-grade crossings on the line, blockages of those crossings, and the status of operating protocols with third-party carriers to assist Board monitoring of the situation.

Decided: June 21, 2016

In a decision served on February 8, 2013, the Board approved (1) an application filed by CSX Transportation, Inc. (CSXT), to acquire an operating easement over a rail line of the Grand Trunk Western Railway Company (GTW) in the Chicago area (Elsdon Line or Line) subject to environmental conditions and standard labor protective conditions, and (2) two related trackage rights exemptions. See CSX Transp., Inc.—Acquis. of Operating Easement—Grand Trunk W. R.R. (Elsdon Decision), FD 35522, et al. (STB served Feb. 8, 2013).

Board Members and staff have continued to monitor CSXT's efforts to address problems that have arisen on the Line since the agency approved the application. In February 2014, CSXT representatives met with Chairman Elliott, Board Member Begeman, and Board staff to discuss the gate and signaling problems CSXT had inherited unexpectedly in the transaction and how they would be addressed. In August 2014, as part of a broader tour of the Chicago area, Chairman Elliott and Board Member Begeman toured the Line and met with community leaders and CSXT officials. In October 2015, Vice Chairman Miller and Board staff toured the Line and

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

met with CSXT staff. Meanwhile, from 2014 until early 2016, staff from the STB's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) regularly communicated with both local government officials and CSXT representatives regarding the issues arising from CSXT operations on the Line. Specifically, OPAGAC staff held regularly scheduled conference calls with CSXT personnel, and additional calls with local officials, as they worked together to address community concerns regarding rail operations impacting Evergreen Park and the vicinity. OPAGAC staff also toured the Line in September 2015.

On February 12, 2016, the City of Chicago and the Village of Evergreen Park (Chicago Communities) jointly petitioned the Board to reopen the acquisition proceeding and impose sanctions and operational limitations on CSXT based primarily on an unacceptably high number of street blockages stemming from CSXT's operations and equipment failures at at-grade crossings. On March 10, 2016, the Board received letters from citizens and community organizations raising similar concerns. CSXT replied to the Chicago Communities' petition to reopen on March 10, 2016, and to the letters from citizens and community organizations on March 30, 2016. CSXT argues that reopening is not warranted here, claiming that it has not violated any Board-imposed mitigation conditions and noting that it has taken action to reduce the street blockages.

The Board has allowed CSXT more than enough time to address the many problems that have arisen on the Line since the application was approved three years ago. We must hold CSXT accountable to the representations it made in its application that the Board relied on in approving the application. As discussed below, CSXT is not complying with the following representation it made in its application:

CSXT will not operate trains into or out of the Chicago Terminal over the Elsdon Line unless the route and CSXT's partner can accept the train without delay or interruption. For example, CSXT will not allow a train destined for Clearing Yard, via Hayford that originates in Nashville to enter the Elsdon Line without knowing it can operate to Clearing Yard without delay.

(Application 17-18.) Therefore, the Board directs CSXT to immediately comply with the representation, and if it is unable to do so, to show cause why it cannot. We presume that the only lengthy blockages that may occur after this order would be related to malfunctioning gates or other equipment, or to interference from other railroads that arises after CSXT's train enters the Elsdon Line, since CSXT will be complying with its representation that it will not operate trains over the Elsdon Line unless the route and CSXT's partner can accept the train. CSXT compliance with this representation is particularly important in light of its argument that compliance with its Voluntary Mitigation (VM) 6 commitment to cut trains (described in the Background section) is effectively counterproductive. (CSXT Mar. 10 Reply 5-6.)

In addition, the Chicago Communities have demonstrated that, despite CSXT's efforts to address the problem, street blockages exceeding 10 minutes on the Elsdon Line have resulted from stopped trains, slow moving trains, and malfunctioning gates and that the length of blockages of major thoroughfares has been substantially in excess of the approximately three-minute delays anticipated in 2013 when the Board approved CSXT's application. Based on

these showings, we will reopen this proceeding to require CSXT to report on any street blockages that occur on the Line. These monthly reports will allow the Board to closely monitor what is taking place and assess CSXT's claims that the blockages along the Elsdon Line are being addressed. If the new data reported by CSXT demonstrates that CSXT is not making significant progress or that the situation is not improving, we will then take additional action, as appropriate.

BACKGROUND

As discussed in the Elsdon Decision, CSXT and GTW agreed to exchange perpetual rail operating easements over certain parts of each other's lines. GTW agreed to grant CSXT an easement over GTW's Elsdon Line and retained local and overhead trackage rights.² In exchange for its easement over the Elsdon Line, CSXT agreed to grant GTW an easement over a CSXT line between Leewood, Tenn., and Aulon, Tenn., over which CSXT retained trackage rights.

CSXT supported its application to acquire its easement over the Elsdon Line by detailing efficiencies it could achieve with the easement by routing more trains over parts of the Elsdon Line. CSXT also claimed that the easement would further the goals of the Chicago Regional Environmental and Transportation Efficiency (CREATE) program to increase the efficiency of the Chicago region's rail infrastructure by reducing train delays and congestion throughout the area. See Elsdon Decision at 3-4. Although CSXT anticipated that the transaction would increase train traffic on three segments of the Elsdon Line by 10 to 19.5 trains per day, as noted, CSXT represented that it would send trains at 40 mph and only when the entire Line was clear and the train could be sent without stopping. Therefore, CSXT estimated that trains would only block at-grade crossings for about three minutes per train. (Application 17-18.)

Because the projected increases in train traffic on some segments of the Elsdon Line exceeded the Board's applicable three trains per day threshold for environmental review (49 C.F.R. § 1105.7(e)(5)(ii)(A)), the Board's Office of Environmental Analysis (OEA) prepared an Environmental Assessment (EA) analyzing both the effects of increased operations over the Elsdon Line and other potential environmental impacts anticipated to result from the transaction. See Elsdon Decision at 10-17 (summarizing the environmental review process). OEA issued a Draft EA on October 5, 2012, for public review and comment, providing the results of its analysis, and a Final EA on January 9, 2013, addressing the comments received. The Final EA recommended 50 mitigation conditions, including both voluntary mitigation measures proposed by CSXT and measures developed by OEA, to minimize potential environmental impacts of the transaction.

Among the issues analyzed in the EA were the impacts the increase in train traffic would have on vehicle traffic delays at at-grade crossings. After conducting its analysis, OEA concluded that, because CSXT would control dispatching on the Elsdon Line and would move its

² CSXT also agreed to convey local and overhead trackage rights over the Elsdon Line to various GTW affiliates and a CSXT affiliate.

trains uninterrupted and straight through the Line, the estimated average delay per vehicle would not exceed 2.6 minutes at any at-grade crossing on the Line. (Draft EA at 3-19-3-21). To further address potential traffic delays, OEA recommended mitigation measures, including measures to reduce the potential impacts on emergency services.³

The Board granted CSXT's application and the related trackage rights exemptions in its Elsdon Decision. The Board found that CSXT's acquisition of the operating easement was not likely to result in a substantial lessening of competition or the creation of a monopoly or restraint of trade. Furthermore, the Board found that, by allowing CSXT greater access to the Elsdon Line, the easement would result in more efficient CSXT operations in the Chicago area, increase capacity on the lines of other railroads, and provide more efficient service to shippers without eliminating service options. See Elsdon Decision 5-6.

As for environmental matters, the Board adopted OEA's analysis and conclusions and imposed the 50 mitigation measures recommended in the Final EA. Among the conditions are VM 6, providing that a public crossing must not be blocked longer than 10 minutes unless it cannot be avoided and that, if a blockage is likely to last longer than 10 minutes, the train shall be cut; VM 37 and Mitigation Measure (MM) 2, requiring CSXT to take certain actions to facilitate the timely response of emergency service providers in the area; VM 45, requiring CSXT to submit quarterly reports for the first three years of its operations discussing its progress in implementing the Board's mitigation measures;⁴ and VM 46, providing for review of the Board's mitigation measures if there is a material change in facts or circumstances during the three-year quarterly reporting period.⁵

On February 12, 2016, the Chicago Communities jointly petitioned the Board to reopen the acquisition proceeding and impose sanctions and additional mitigation to remedy serious harmful effects caused by CSXT's operations on the Elsdon Line and its alleged non-compliance with the mitigation measures the Board imposed. The Chicago Communities state that CSXT's operations have resulted in repeated and increased instances of blockages of major thoroughfares for prolonged periods of time. In many cases, the Chicago Communities allege, these blockages have impeded access to two area hospitals by personal and emergency vehicles and constricted access to and from Evergreen Park's firehouse and police station. According to the Chicago Communities, these blockages are a result of stopped trains, slow-moving trains, and miscellaneous gate malfunctions (i.e., instances in which gates close when there is not a train present or, conversely, when the gates fail to close despite a train having entered the crossing).

³ Concerns about the impact of traffic delays caused by malfunctioning gates and other malfunctioning equipment at grade crossings were not raised during the environmental review process, and the mitigation recommended in the EA does not specifically address that issue.

⁴ CSXT's quarterly reporting is due to end on June 30, 2016.

⁵ Other mitigation measures addressed safety, hazardous materials transportation, air quality, noise and vibration, and environmental justice. The Board also required CSXT to establish a community liaison to consult with affected communities to develop cooperative solutions to local concerns.

(Pet. 13.) They further allege that, between July 3, 2013 and the end of November 2015, equipment malfunctions made up 86% of the total number of incidents reported to Evergreen Park Police and that most of these incidents took more than 10 minutes to resolve. According to the Chicago Communities, crossing blockages caused by gates operating without a train present or as the result of other equipment failures occurred on 175 occasions during this period. (Id. at 14.)

The Chicago Communities allege that CSXT has continually violated VM 6 by only once cutting a train that blocked a crossing for more than 10 minutes. (Id. at 8.) They also allege that CSXT failed to meet its quarterly reporting obligations under VM 45 because it underreported the number of incidents where blockages have occurred by only including in its reports incidents where (a) long-term crossing closures of approximately one week each to accommodate maintenance work occurred in November and December, 2013, and (b) blocked grade crossings were caused by a stopped train. (Id. at 14.)

The Chicago Communities ask that the Board reopen the proceeding, extend the three-year period during which CSXT must file its quarterly reports, conduct an audit of CSXT's operations and the extent to which CSXT's quarterly reports accurately reflect the impacts of those operations, and impose sanctions, including fines, on CSXT for violating the Board's conditions. They also request that the Board impose additional mitigation, including a grade-separated crossing condition for 95th Street and a limit on the hours when CSXT can operate through Evergreen Park.

In CSXT's March 10, 2016 reply, it asserts that it has not violated any of the conditions imposed by the Board in the Elsdon Decision, that circumstances have not changed so as to warrant reopening the proceeding, and that the fines and other relief the Chicago Communities request are not warranted here. CSXT states that it has been working to eliminate the causes of blocked crossings on the Elsdon Line. CSXT asserts that it has invested \$12 million toward infrastructure improvements on the Line since 2013, which has gone toward rebuilding grade crossings on major intersections, new signal technology, new rail ties, new cameras to monitor operations, and double-wiring of grade-crossing signals at two trouble spots (94th and Kedzie and 95th Street). In addition, CSXT states it spent more than \$650,000 in 2015 to correct the false activation of signals, which can lead to grade crossing blockages. CSXT claims that these investments have improved crossing-signal performance, decreased blocked crossings at 95th Street and elsewhere, and reduced false signal activations and the idling of CSXT trains in the area. (See CSXT Mar. 10 Reply 2-5, 7, 10.) CSXT also asserts that its new protocols with other carriers have minimized blockages caused when CSXT must stop trains traveling on the Elsdon Line because of potential interference by trains operated by other carriers on lines that the Elsdon Line crosses. (See CSXT Mar. 10 Reply 10-11).

With respect to compliance with the Board's environmental conditions, CSXT asserts that it has not violated VM 6, which provides that "a public crossing must not be blocked longer than 10 minutes unless it cannot be avoided." CSXT states that sometimes a crossing blockage of over 10 minutes is unavoidable in the congested Chicago terminal. CSXT adds that, while it does cut trains when that is the best way to clear a blocked crossing, cutting trains takes time (typically 30-35 minutes to cut the train and another 30 to 35 minutes to reassemble it) and,

therefore, cutting trains only makes sense when a blockage is expected to be lengthy and not simply in excess of 10 minutes. (CSXT Mar. 10 Reply 5-6).⁶ CSXT also argues that it has complied with the Board's quarterly reporting requirements (VM 45) by keeping the Board apprised of its progress implementing and complying with the environmental conditions imposed in the Elsdon Decision. (See March 10 Reply 6).

On March 10, 2016, the Board received numerous letters from citizens echoing concerns raised by the Chicago Communities. In a March 30, 2016 response, CSXT asserts that it takes these concerns seriously and that the situation along the Elsdon Line has improved. CSXT further details steps it has taken to reduce or eliminate street blockages, including weekly walking inspections of crossings, installing remote monitoring equipment at certain grade crossings to provide daily gate activity data that is analyzed to identify problems, and establishing procedures for expediting signal repairs. CSXT notes that it also plans to add video surveillance at key grade crossings, change island circuits, and install Positive Train Control (PTC) on the Elsdon Line.

CSXT concurrently submitted its quarterly report to OEA, covering the period December 1, 2015 – February 29, 2016. CSXT notes that, while it runs approximately 35-45 trains per week on the Line, 16 trains that were stopped for more than 10 minutes blocked crossings on the Line during the quarter. Additionally, in the Evergreen Park area, CSXT reports that there were 37 “unique train events” that blocked 90 crossings for more than 10 minutes. CSXT says there were also three false gate activations during the quarter and 39 idling trains caused by congestion on other lines. (CSXT 11th Quarter Letter 2-3.)

The Chicago Communities filed a reply to CSXT's March 30 reply on April 29, 2016. Among other things, they assert that CSXT represented that it would not run trains during rush hour. The Chicago Communities further ask that the Board impose a condition requiring that CSXT confirm that the Line is clear and will be able to accommodate trains at the receiving end before a train may proceed onto the Line, and report on its performance.

CSXT filed a reply to the Chicago Communities' April 29 filing on May 19, 2016.⁷ CSXT indicates that it has prioritized the elimination of crossing delays through Evergreen Park by conducting weekly walking inspections, installing equipment, and developing processes that enhance reporting capability and remote monitoring of gates. CSXT also represents that it has installed cameras at all grade crossings in and near Evergreen Park and submitted plans to the

⁶ CSXT does not specify a length of time that would make cutting a train a reasonable course of action for alleviating a blockage.

⁷ The Chicago Communities concurrently filed a motion asking the Board to accept their April 29 filing even though it is a “reply to reply” and hence not permitted under the Board's regulations. CSXT opposes acceptance of the filing because it is late and purportedly does not lead to a more complete record. We will accept the Chicago Communities April 29 filing and CSXT's reply into the record because they provide useful information about the parties' positions and a developing situation.

Illinois Commerce Commission to change the island circuits at 94th Street and Kedzie Avenue and at 95th Street to reduce waiting time once a train has passed.

DISCUSSION AND CONCLUSIONS

As noted above, CSXT's application stated in no uncertain terms that it would not start trains over the Elsdon Line unless the Line is clear. (Application 17-18.) On the basis of the information presented to it, including this representation, the Board authorized the transaction. See Elsdon Decision at 13. CSXT suggests that it complies with its representation, stating that "[w]hen a CSXT train enters the Elsdon Line it has a clear signal to the point where it will leave the line." (See CSXT Mar. 10 Reply 12.) However, in opposing the Chicago Communities' request for a condition enforcing this representation (Chicago Communities Pet. 17), CSXT states that doing so would "delay[] CSXT trains under criteria that no other railroad must meet . . ." (See CSXT May 19 Reply 8.) The Board reminds CSXT that other railroads did not obtain Board authorization for a proposed transaction by committing to comply with these criteria. Accordingly, CSXT is directed to comply with the representation it made in its application, and if it is unable to do so, to show cause why it cannot.

In light of CSXT's representation that it would not route a train onto the Elsdon Line unless the Line was clear and the point of exit was clear, the Board is particularly concerned by the comments received regarding the idling of CSXT trains on the Elsdon Line. (See Mar. 10 Comment from Concerned Citizens of Ward 19 and Evergreen Park.) In the Elsdon Decision (slip op. 13), the Board noted CSXT's statement that because CSXT controlled dispatching on the Line, it should be able to operate trains at the maximum allowable speed. If operations on the Elsdon Line resembled the practices to which CSXT committed in its application, trains should rarely idle on the Line, if ever. The current record, however, does not bear out that expectation. (See Mar. 10 Comment from Concerned Citizens of Ward 19 and Evergreen Park; Chicago Communities Pet. 13, Ex. C.)

CSXT attributes the idling trains to the necessity of avoiding potential interference with trains of other carriers on lines the Elsdon Line crosses. CSXT states that it is developing operating protocols with these other carriers to ensure that such interference is minimized in the future. It is unclear from the record when these discussions began, but CSXT should have been talking with the other carriers to develop protocols immediately after the transaction was approved, if not sooner.⁸ We expect CSXT to adhere to the representations it has made and take steps to avoid idling on the Elsdon Line.

Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of "material error, new evidence, or substantially changed circumstances." The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its

⁸ See also Elsdon Decision at 19 ("VM 4. In order to minimize the number of trains being stopped by operators at locations that block grade crossings on the Elsdon Line, CSXT shall work with other railroads to establish reasonable and effective policies and procedures to prevent other railroads' trains from interfering with CSXT's trains on the Elsdon Line.").

prior decision. See BNSF Ry.—Aban. Exemption—in King Cty., Wash., AB 6 (Sub-No. 290), slip op. at 2-3 (STB served Mar. 9, 2016).

After three years of overseeing CSXT's efforts to address problems—many that we recognize CSXT did not expect when it proposed acquiring the line—the Board finds it appropriate to further focus CSXT's efforts at fixing identified problems. Here, the Chicago Communities have presented new evidence and shown substantially changed circumstances that warrant reopening this proceeding to address CSXT's compliance with its representations to the Board, and to look further into the condition of the at-grade crossings on the Elsdon Line, what CSXT is doing to maintain them, the number of traffic blockages exceeding 10 minutes that continue to occur, and CSXT's response to those blockages. Although concerns were raised during the EA process about traffic blockages at at-grade crossings that could result from CSXT's increased operations over the Elsdon Line, the blockages described by the Chicago Communities are more severe than what was anticipated at that time. As discussed above, the Board anticipated that blockages of at-grade crossings would be rare, except for relatively short blockages (of approximately three minutes), because CSXT would not have trains enter the Line unless the entire Line was clear and would send through trains at 40 mph without stopping. However, longer blockages have frequently occurred, due in part to faulty equipment, bad signals and/or malfunctioning gates. CSXT acknowledges the problems with the equipment, but appears to argue that it should only be held accountable for blocked crossings caused by its own train operations. (See Mar. 10 Reply 4-5.)

CSXT claims that because it inherited the malfunctioning equipment, it does not constitute a basis for reopening. We disagree. CSXT became the party responsible for maintaining the Line (including any malfunctioning equipment) upon its consummation of the transaction. Moreover, there was no indication during the acquisition proceeding that faulty equipment, bad signals and/or malfunctioning gates would result in so many lengthy blockages. Had the Board or the parties to the proceeding been aware of this issue at the time of the environmental review, it likely would have led the Board to consider imposing additional or different mitigation conditions. As a result, the Chicago Communities' evidence regarding excessive blockages constitutes new evidence and substantially changed circumstances that warrant reopening.

CSXT represents that recently it has taken substantial steps to decrease the number and duration of blockages and that it anticipates these figures will continue to decline. To ensure that conditions are improving, it is important that the Board be kept apprised of the efforts that CSXT is making to address the specific concerns that have been raised by the Chicago Communities. Therefore, we direct CSXT to file monthly reports addressing the malfunctioning gate issue, CSXT's progress in resolving that issue, the number of at-grade crossing blockages that exceed 10 minutes, and situations where trains are not being cut and why. For the reasons discussed above, in each monthly report, CSXT will also be required to provide the Board with an update on the progress it has made in establishing operating protocols with other carriers on lines the Elsdon Line crosses.

Specifically, CSXT's monthly reports shall be filed for a period of one year, and shall include the following information:

1. With respect to each at-grade crossing on the Elsdon Line:
 - Identify the level of crossing protection (i.e., gates, lights, etc.);
 - Disclose each crossing equipped with gates and whether the gate is working properly.
 - If the gate is not working properly, indicate the steps being taken to repair it and when that repair will occur.
 - If a repair has already been made, indicate when it was discovered and when it was fixed.
2. For each at-grade crossing blockage of more than 10 minutes:
 - Provide the location, date, time, and duration;
 - Identify the cause of the blockage (e.g., stopped train, slow-moving train, gate malfunction, etc.);
 - Indicate whether a train was cut for each blockage caused by a stopped train; and if it was not cut, indicate why.
3. Provide the status of operating protocols with Norfolk Southern Railway Company, METRA, Indiana Harbor Belt Railroad, and any other rail carriers whose operations could cause interference with CSXT's operations on the Elsdon Line.

CSXT's first monthly report shall cover July. This report and the subsequent monthly reports shall be due 15 days after the end of each month. Based on the information contained in these reports, we will assess CSXT's progress in remedying the malfunctioning gates and idling trains. Upon review of each report, we will determine whether to take further action if it appears the situation is not significantly improving. In the meantime, we strongly encourage CSXT to continue its efforts to prevent blockages and to repair defective signals and gates on the Elsdon Line.

In light of the targeted monthly reporting we are requiring in this decision, the quarterly oversight reporting required under mitigation measure VM 45 of the Elsdon Decision shall expire as scheduled following submission of the 12th quarterly report due on June 30, 2016.

It is ordered:

1. This proceeding is reopened.
2. The Chicago Communities' April 29 motion to accept their concurrently filed reply is granted, and the filing and CSXT's reply are submitted into the record.
3. CSXT is directed to comply with its representation that it would not allow a train to enter the Elsdon Line unless the Line is clear, and if it is unable to do so, to show cause, by July 20, 2016, why it cannot. Should CSXT make a filing to show cause, the Chicago Communities may file a reply within 20 days after CSXT's submission is filed.
4. CSXT shall file the monthly reports described above.

5. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

VICE CHAIRMAN MILLER, commenting:

While I am satisfied with the decision that the Board has reached today, the decision also is an example of why I believe the agency needs to re-examine its processes, with a focus on issuing more timely decisions. Given the seriousness of the issues raised in the petition, the Board made this proceeding one of its top priorities, but even still, it took the agency months to issue a ruling. The fact that parties in even the most urgent cases must still wait months before a decision is issued demonstrates the need for the Board to reconsider our internal decision-making process. In particular, the Board needs to develop a system in which reasonable deadlines are set and compliance with those deadlines is strictly adhered to. Until such a system is in place, the Board will continue to take far too long to act, even when the issue is one of priority.